

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

ARC Venture Holding, Inc., *et al.*,

Debtors.¹

Case No. 08 – 46367

(Jointly Administered)

RESPONSE TO MOTION IN LIMINE

K&L Gates LLP (“*K&L Gates*”) hereby responds (the “*Response*”) to the *Motion in Limine* (the “*Motion*”) of Brian F. Leonard (“*Leonard*”), the chapter 7 trustee appointed in the above-captioned bankruptcy cases, to exclude K&L Gates from submitting any evidence or arguments at the hearing on the *Final Fee Application of K&L Gates as Counsel to the Official Committee of Unsecured Creditors* (the “*Application*”). In support hereof, K&L Gates respectfully states as follows:

In the Motion, Leonard incorrectly states the facts as they pertain to the document request (the “*Request*”) and similarly requests extraordinary and disproportionate relief. Not only has K&L Gates produced the majority of the requested non-privileged information to Leonard, but Leonard never conferred with K&L Gates in good faith before filing the Motion as required by Rule 37 of the Federal Rules of Civil Procedure.

Leonard’s Request seeks five categories of information, several of which are clearly

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requests for work product or privileged information which K&L Gates has no obligation to turn over to Leonard. Over the course of the past several weeks, however, K&L Gates has provided the requested information to Leonard in several batches, including work product in the form of internal e-mail correspondence and draft documents prepared by K&L Gates. In addition, K&L Gates has provided Leonard with detailed break downs of time records as requested. Had K&L Gates filed a formal response to Leonard's Request, it would have objected to any request for privileged or work-product documents, and produced no more documents than have already been given to Leonard. *See Response to Demand for Production of Documents by Chapter 7 Trustee to K&L Gates LLP*, attached hereto and incorporated herein as Exhibit A.

The appropriate action for Leonard in this case would have been to file a motion to compel discovery pursuant to Rule 37 of the Federal Rules of Civil Procedure, made applicable to these proceedings by Rule 7037 of the Federal Rules of Bankruptcy Procedure. However, Leonard did not even satisfy the requisite conditions to file such a motion. In moving to compel discovery, the motion must include "a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action." Fed. R. Civ. Pro. 37(a)(2)(B).

On August 17, 2009, the date that the response to the Request was due, the parties to the Application dispute had a conference call to discuss undisputed facts, what documents the parties would use as exhibits, and who the parties would call as witnesses for the hearing on the Application. On that call, Leonard did not mention the Request to K&L Gates, nor at any time for the next three days did he attempt to confer in good faith about K&L Gates's alleged failure to respond. On August 20, 2009, Leonard left a voicemail message for Robert Shannon of K&L Gates informing him that a motion would be filed. Mr. Shannon, recognizing that K&L Gates

had merely overlooked providing Leonard with a formal response, provided him with any additional non-privileged, non-objectionable documents he had not already received. Leonard, however, despite K&L Gates's request for the nature of the motion and its efforts to provide the requested documents, filed the Motion to "prohibit [K&L Gates] from submitting any evidence or arguments at the hearing scheduled for 2:00 o'clock [sic] p.m. on August 26, 2009, and /or for such other measures and determinations as the Court deems appropriate."

Leonard's motion was not only made without a good faith attempt to resolve the dispute, but it seeks an inappropriate remedy under the circumstances. If K&L Gates had refused to comply after a conference with Leonard, he should have first filed a motion to compel production of documents. At that point, if K&L Gates failed to comply (which it did not and would not have), an appropriate remedy for failure to produce documents in connection with the hearing would be to exclude those documents proposed as exhibits that were not previously produced. K&L Gates has provided Leonard and the other parties to this dispute with all documents it may use as exhibits at the hearing on the Application. To exclude K&L Gates from submitting *any* evidence or arguments would be an extreme and inappropriate remedy.

WHEREFORE, K&L Gates respectfully requests that the Motion be denied.

Dated: August 24, 2009

Respectfully submitted,

K&L GATES LLP

By: /s/ Sarah H. Bryan

Robert V. Shannon (admitted pro hac vice)
Sven T. Nylen (admitted pro hac vice)
Sarah H. Bryan (admitted pro hac vice)
K&L Gates LLP
70 West Madison Street, Suite 3100
Chicago, Illinois 60602-4207
Telephone: (312) 372-1121
Facsimile: (312) 827-8000

EXHIBIT A

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

ARC Venture Holding, Inc., *et al.*,

Debtors.¹

Case No. 08 – 46367

(Jointly Administered)

**RESPONSE TO DEMAND FOR PRODUCTION OF DOCUMENTS
BY CHAPTER 7 TRUSTEE TO K&L GATES, LLP**

K&L Gates LLP (“*K&L Gates*”) hereby responds to the *Demand for Production of Documents by Chapter 7 Trustee to K&L Gates, LLP*, issued by Brian Leonard, the chapter 7 trustee for the above-captioned bankruptcy cases (“*Leonard*”), as follows:

General Objections

K&L Gates objects to Leonard’s Demand for Production (the “*Demand*”) to the extent that Demand: (a) uses vague, ambiguous, undefined or argumentative terms; (b) purports to call for the disclosure of information protected by any immunity or privilege, including but not limited to attorney work product, attorney-client communications, and/or services performed in the rendering of legal advice; (c) purports to require the disclosure of information or the production or description of documents in the possession, custody, and control of persons other than K&L Gates; (d) purports to require the disclosure of information or production or description of documents which Leonard has in his possession (including but not limited to all

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pleadings and filings in this action and matters of public record) and any documents not within the K&L Gates's exclusive control and to which Leonard has equal or superior access; (e) purports to impose any burden upon K&L Gates not required by the applicable discovery provisions of the Federal Rules of Civil Procedure, the Federal Bankruptcy Rules, or the Local Rules for the Bankruptcy Court for the District of Minnesota.

K&L Gates's answers are made without intending to waive, and are intended to preserve: (a) all objections to the competency, relevancy, materiality, and admissibility of any information disclosed or to the use of that information in any subsequent proceedings, including the hearing on this or any other matter; and (b) K&L Gates's rights to amend, supplement or modify any responses and objections herein. K&L Gates reserves its right to answer over the objections at the time agreed to with Leonard.

Each of the responses which follow are subject to the foregoing objections.

Documents to Be Produced

1. All internal e-mails, writings, and records of any nature, including electronic records, which reflect and evidence all communications by, between, and or among (a) any attorneys, paralegals, and/or employees of K & L Gates, LLP and (b) any attorneys, paralegals, and/or employees of K & L Gates, LLP, on the one hand, and any third party, on the other hand, regarding the cost of the legal services, the fees charged, hours recorded, time records, and the propriety of the legal services and the charges therefore, for the legal services reflected in the Final Fee Application dated June 22, 2009 filed by K & L Gates, LLP in this matter (the "*Final Fee Application*").

Response: In addition to the above General Objections, K&L Gates objects to Demand No. 1 on the grounds that it calls for the disclosure of attorney work product.

2. All memoranda, working papers, and documents which otherwise encapsulate, and/or summarize, the work, and work product, reflected in said Final Fee Application dealing with the “investigation, and research and analysis of potential causes of action against the debtors, their insiders, and their non-debtor affiliates”, which are further reflected and discussed on paragraph C, page 9, and paragraph N, page 12, of said Final Fee Application.

Response: In addition to the above General Objections, K&L Gates objects to Demand No. 2 on the grounds that it calls for the disclosure of attorney work product. Subject to and without waiving the foregoing objections, K&L Gates has provided Leonard with copies of e-mail correspondence and internal memoranda responsive to Demand No. 2.

3. Separately, a detail of all time records, and line item time records reflecting legal services as set forth in the Final Fee Application dealing with and contesting and objecting to the Motion for Adequate Protection filed by the “Fleet Lenders,” and prosecuting the Objection of the Unsecured Creditors’ Committee with respect thereto.

Response: In addition to the above General Objections, K&L Gates objects to Demand No. 3 on the grounds that it calls for publicly available information that was filed as exhibits to the Final Fee Application. Subject to and without waiving the foregoing objections, K&L Gates has provided Leonard with a break down of time entries as requested in Demand No. 3.

4. Copies of all minutes, notes, memoranda, and recordings of (a) any meetings of the Unsecured Creditors Committee, telephonic or otherwise, which occurred from April 8, 2009 to the present, and (b) any communications by any attorney employed by or a member of K & L Gates, LLP, and any member of the Unsecured Creditors Committee, from and after April 8, 2009 to the date of your response.

Response: In addition to the above General Objections, K&L Gates objects to Demand No. 4 on the grounds that it calls for attorney work product and privileged attorney-client

communications. Stating further, K&L Gates objects to the scope of Demand No. 4 on the grounds that the Final Fee Application covers services rendered through June 3, 2009, and any communications after such time are irrelevant. Subject to and without waiving the foregoing objections, K&L Gates has provided Leonard with meeting minutes for the Committee meeting taking place on May 12, 2009, as well as several e-mail correspondence between Committee members and K&L Gates.

5. Copies of all documents which reflect communications of any nature between any K & L Gates, LLP attorney or employee, on the one hand, and any other professional hired by the Unsecured Creditors Committee, on the other hand, from May 1, 2009 to the date of your response.

Response: In addition to the above General Objections, K&L Gates objects to Demand No. 5 on the grounds that it calls for privileged communications. Stating further, K&L Gates objects to the scope of Demand No. 5 on the grounds that the Final Fee Application covers services rendered through June 3, 2009, and any communications after such time are irrelevant.

Dated: August 24, 2009

As to Objections:

K&L GATES LLP

By: /s/ Sarah H. Bryan

Robert V. Shannon (admitted pro hac vice)
Sven T. Nylen (admitted pro hac vice)
Sarah H. Bryan (admitted pro hac vice)
K&L Gates LLP
70 West Madison Street, Suite 3100
Chicago, Illinois 60602-4207
Telephone: (312) 372-1121
Facsimile: (312) 827-8000

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UNSWORN CERTIFICATE OF SERVICE

I, Sarah H. Bryan, under penalty of perjury, hereby declare that on August 24, 2009, in connection with the above-referenced matter, the following document:

1. RESPONSE TO MOTION IN LIMINE

was filed with the Clerk of Court via CM/ECF system, and ECF will send a notice of electronic filing to all of the parties requesting electronic notice.

CM/ECF Electronic Notice List

Marc A. Al on behalf of Interested Party Bond Safeguard Insurance Co. and
maal@stoel.com jlhanson@stoel.com mrlemke@stoel.com

Thomas C Atmore on behalf of Plaintiff BRIAN LEONARD - TRUSTEE
tatmore@losgs.com lfischer@losgs.com

Alan E. Brown on behalf of Debtor ARC Venture Holding, Inc.
abrown@larkinhoffman.com

Edwin H. Caldie on behalf of Interested Party Hyundai Capital America
Edwin.Caldie@fmjlaw.com

Roylene A Champeaux on behalf of Interested Party United States Air Force, c/o Roylene A. Champeaux
Roylene.Champeaux@usdoj.gov karen.malikowski@usdoj.gov;
usamn.ecfbankruptcy@usdoj.gov Muriel.Holland@usdoj.gov

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Monica L. Clark on behalf of Interested Party U.S. Bank National Association
clark.monica@dorseylaw.com

Kenneth Corey-Edstrom on behalf of Debtor ARC Venture Holding, Inc.
kcoreyedstrom@larkinhoffman.com bhogan@larkinhoffman.com
bpeppersack@larkinhoffman.com klatham@larkinhoffman.com

William J. Coughlin on behalf of Interested Party Axle Capital, LLC
wjclaw@yahoo.com

John P. Dillman on behalf of Interested Party Consolidated Tax Collections of Washington County
houston_bankruptcy@publicans.com

Jeffer, Mangels, Butler & Marmaro LL Djang on behalf of Creditor Knight Management Insurance Services, LLC
crd@jmbm.com

Michelle K. Dove on behalf of Interested Party U.S. Bank National Association
dove.michelle@dorsey.com yokiel.maryjo@dorsey.com

Theresa H. Dykoschak on behalf of Creditor DELL FINANCIAL SERVICES LLC
tdykoschak@faegre.com bwalz@faegre.com

Michael E. Emrich on behalf of Creditor Riverside Claims, LLC.
notice@regencap.com memrich@regencap.com

Thomas Flynn on behalf of Debtor ARC Venture Holding, Inc.
tflynn@larkinhoffman.com bpeppersack@larkinhoffman.com klatham@larkinhoffman.com

MICHAEL J. GEARIN on behalf of Interested Party Expedia, Inc. Expedia, Inc. d/b/a Expedia Travel, Hotels.com, Hotwire, Inc., TravelNow.com, Inc. and Travelscape, LLC
michael.gearin@klgates.com bankruptcyecf@klgates.com

Edward W Gale on behalf of Plaintiff BRIAN LEONARD - TRUSTEE
egale@losgs.com lfischer@losgs.com

Steven A. Ginther on behalf of Interested Party Missouri Department of Revenue
mn@dor.mo.gov

Lara O. Glaesman on behalf of Interested Party Hyundai Capital America
lara.glaesman@fmjlaw.com

Wesley T. Graham on behalf of Interested Party Sabre Inc. and Travelocity.com LP
wgraham@hensonefron.com cfisher@hensonefron.com

Harris Beach PLLC Griffith on behalf of Interested Party Bond Safeguard Insurance Co. and
kgriffith@harrisbeach.com kryan@harrisbeach.com

Stephen F Grinnell on behalf of Interested Party Chrysler Financial Services Americas LLC
stephen.grinnell@gpmlaw.com

Ronald E. Haglof on behalf of Creditor ENTERPRISE RENT-A-CAR COMPANY
rhaglof@thompsoncoburn.com cducey@thompsoncoburn.com

Leslie Kathleen Harrell-Latham on behalf of Debtor ARC Venture Holding, Inc.
klatham@larkinhoffman.com mleonard@larkinhoffman.com

Andrea M. Hauser on behalf of Trustee Brian Leonard
ahauser@losgs.com

Thompson, O'Brien, Kemp & Nasuti, P Hight on behalf of Interested Party Mansfield Oil Company
thight@tokn.com

Jane M. Hill on behalf of Creditor PEAKSTONE FINANCIAL SERVICES INC
jhill@larsonking.com rsommers@larsonking.com jlurken@larsonking.com
gyang@larsonking.com

Mark J. Kalla on behalf of Other Party BANK OF THE WEST
kalla.mark@dorsey.com hanson.leann@dorsey.com

Douglas W. Kassebaum on behalf of Interested Party ROSEDALE DODGE, INC.
dkassebaum@fredlaw.com scharter@fredlaw.com bankruptcy@fredlaw.com

Robert T. Kugler on behalf of Interested Party State Farm Mutual Automobile Insurance Company
robert.kugler@leonard.com callie.sanford@leonard.com

Connie Lahn on behalf of Interested Party Hyundai Motor Finance Company
connie.lahn@fmjlaw.com Aong.Moua@fmjlaw.com

Thomas Lallier on behalf of Creditor Directory Advertising Specialists, Inc. dba DAS Group
tlallier@foleymansfield.com

John D. Lamey on behalf of Creditor LALUMBRE INVESTMENT, LLC
bankrupt@lameylaw.com shari@lameylaw.com blair@lameylaw.com ewright@lameylaw.com

David A. Lander on behalf of Creditor ENTERPRISE RENT-A-CAR
dlander@thompsoncoburn.com hspurgeon@thompsoncoburn.com

Joseph W. Lawver on behalf of Creditor CARLTON FINANCIAL CORPORATION
jlawver@messerlikramer.com mnygaard@messerlikramer.com

William H. Leech on behalf of Creditor PEAKSTONE FINANCIAL SERVICES INC
bleech@cctb.com vbarr@cctb.com

Brian Leonard
bleonard@losgs.com mn03@ecfcbis.com

Brian F Leonard on behalf of Plaintiff BRIAN LEONARD - TRUSTEE
bleonard@losgs.com

Jennifer Lurken on behalf of Creditor Peakstone Financial Services, Inc., d/b/a Sonoran National Insurance Group
jlurken@larsonking.com gyang@larsonking.com

Nauni J Manty on behalf of Creditor CONSTANCE CASELLA
ecf@mantylaw.com

Ralph Mitchell on behalf of Creditor Committee UNSECURED CREDITORS COMMITTEE
rmitchell@lapplibra.com jpipp@lapplibra.com

Zachary Mosner on behalf of Interested Party STATE OF WASHINGTON
BCUMosner@atg.wa.gov

Cynthia A. Moyer on behalf of Defendant ROSEDALE FLEET LEASING II, LLC
cmoyer@fredlaw.com cthomas@fredlaw.com

Joel D. Nessel on behalf of Interested Party Maria Romano and United States Rent-A-Car, Inc.
jnesset@hinshawlaw.com akulbeik@hinshawlaw.com lswanson@hinshawlaw.com
kmoore@hinshawlaw.com

ROSA ORENSTEIN on behalf of Creditor DALLAS FORT WORTH INTERNATIONAL AIRPORT
rorenstein@lrmlaw.com

Tinna Orduno
torduno@larkinhoffman.com

Jamie R. Pierce on behalf of Interested Party Maria Romano and United States Rent-A-Car, Inc.
jpierce@hinshawlaw.com akulbeik@hinshawlaw.com mpocock@hinshawlaw.com
kmoore@hinshawlaw.com

Lester William Porter on behalf of Interested Party 5757 South Semoran Blvd. LLC
bill.porter@lowndes-law.com JoAnn.Anderson@lowndes-law.com

Robert Raschke on behalf of U.S. Trustee US Trustee
robert.raschke@usdoj.gov

Reagan & McLain Reagan on behalf of Interested Party Star Tire Company, Inc.
bob@reaganmclain.com

Craig E. Reimer on behalf of Interested Party Chrysler Financial Services Americas LLC
creimer@mayerbrown.com samahdi@mayerbrown.com srozen@mayerbrown.com
hroin@mayerbrown.com

Michael E. Ridgway on behalf of U.S. Trustee US Trustee
mike.ridgway@usdoj.gov

Martha A. Romero on behalf of Interested Party c/o Martha E. Romero San Bernardino County
Tax Collector
romero@romerolawfirm.com

Danny E. Ruhl on behalf of Creditor PEAKSTONE FINANCIAL SERVICES INC
druhl@cctb.com vbarr@cctb.com

David E. Runck on behalf of Interested Party Hyundai Capital America
david.runck@fmjlaw.com Aong.Moua@fmjlaw.com

Richard C Salmen on behalf of Interested Party Felhaber, Larson, Fenlon & Vogt, P.A.
rsalmen@felhaber.com

Diane W Sanders on behalf of Interested Party CITY OF EDINBURG
austin.bankruptcy@publicans.com

Randall L. Seaver, Trustee
rlseaver@fullerseaverramette.com

Jacob B. Sellers on behalf of Interested Party State Farm Mutual Automobile Insurance
Company
jacob.sellers@leonard.com callie.sanford@leonard.com

George H Singer on behalf of Interested Party Enterprise Rent-A-Car Company
gsinger@lindquist.com lnorton@lindquist.com

Rebecca G. Sluss on behalf of Interested Party The Hertz Corporation
rluss@oppenheimer.com

Stephen C. Stapleton on behalf of Interested Party Sabre Inc. and Travelocity.com LP
ssapleton@dykema.com

John M. Stern on behalf of Interested Party TEXAS COMPTROLLER OF PUBLIC
ACCOUNTS
john.stern@oag.state.tx.us sherri.simpson@oag.state.tx.us

Matthew A Swanson on behalf of Interested Party State Farm Mutual Automobile Insurance
Company
matthew.swanson@leonard.com callie.sanford@leonard.com

Amy J Swedberg on behalf of Creditor CITY OF PHOENIX
amy.swedberg@maslon.com

Kristina Swenson
kswenson@larkinhoffman.com

US Trustee
ustpreion12.mn.ecf@usdoj.gov

Kimberly A. Walsh on behalf of Interested Party TEXAS COMPTROLLER OF PUBLIC ACCOUNTS
bk-kwalsh@oag.state.tx.us Sherri.simpson@oag.state.tx.us

William P Wassweiler on behalf of Creditor Credit Union of Texas
wwassweiler@lindquist.com lnorton@lindquist.com

Elizabeth Weller on behalf of Interested Party DALLAS COUNTY
bethw@publicans.com dallas.bankruptcy@publicans.com

Rachel L Wright on behalf of Interested Party Hicks Sports Marketing Group
rwright@shannongracey.com

David J. Zoll on behalf of Interested Party City of Kansas City
djzoll@locklaw.com smgrossheim@locklaw.com

Dated: August 24, 2009

Respectfully submitted,

K&L GATES LLP

By: /s/ Sarah H. Bryan

Robert V. Shannon (admitted pro hac vice)
Sven T. Nylen (admitted pro hac vice)
Sarah H. Bryan (admitted pro hac vice)
K&L Gates LLP
70 West Madison Street, Suite 3100
Chicago, Illinois 60602-4207
Telephone: (312) 372-1121
Facsimile: (312) 827-8000